UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/454
9 June 1989
ENGLISH

ORIGINAL: FRENCH

ADMINISTRATIVE TRIBUNAL

Judgement No. 454

Case No. 440: McREYNOLDS

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, Vice-President, presiding; Mr. Samar Sen; Mr. Francisco A Forteza;

Whereas, on 17 February 1987, Desmond McReynolds, a staff member of the United Nations, filed an application which did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas the Applicant, after making the necessary corrections, again filed the application on 28 August 1987;

Whereas the pleas of the application read as follows:

"1. I was admitted to the United Nations Joint Staff Pension Fund effective 11 March 1966.

2. My plea is to have my entry into the Pension Fund changed to 11 March 1964.

3. (Although I joined the United Nations on 25 October 1960 I was requested to resign from my Field Service Level status in order to rejoin as a Field Service Officer [FSO]. Therefore my Entry on Duty date is reflected in all recent P.5 Actions as 11 March 1964, the date on which I was appointed as an FSO). I am not seeking reinstatement into the Pension Fund back to 1960 but simply back to 11 March 1964."

Whereas the Respondent filed his answer on 16 May 1988;

Whereas a copy of the application and of the Respondent's answer was transmitted on 20 September 1988, to the United Nations Joint Staff Pension Board under article 21 of the Rules of the Tribunal;

Whereas the Applicant filed written observations on 10 and 27 October 1988;

Whereas the Secretary to the United Nations Joint Staff Pension Board submitted observations on 21 October 1988;

Whereas, on 11 November 1988, the Executive Secretary of the Tribunal informed the Applicant that the Tribunal had decided to adjourn its consideration of the case until its Spring session to be held in Geneva in May 1989;

Whereas the Tribunal put questions to the Applicant on 24 May 1989 and the Applicant provided answers thereto on 25 and 29 May 1989;

Whereas the Tribunal put a question to the Respondent on 30 May 1989 and the Respondent provided an answer thereto on 31 May 1989;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 25 October 1960, under an indefinite appointment as an English Clerk-Typist with the United Nations Operation in the Congo (ONUC). On 1 August 1961, his appointment was converted to a fixed-term appointment of one year and he became an associate participant in the United Nations Joint Staff Pension Fund. He thereafter received a succession of fixed-term appointments until his resignation from ONUC on 29 February 1964. On 11 March 1964, the Applicant was reappointed as a Field Service Officer under a fixed-term appointment of one year and assigned to the United Nations Commission for the Unification and Rehabilitation of Korea (UNCURK). On 11 March 1965, his appointment was renewed for one year. On 1 April 1965, he was reassigned to the United Nations Truce Supervision Organization (UNTSO) and on 1 November 1965, to the United Nations India-Pakistan Observation Mission (UNIPOM). On 11 March 1966, the Applicant's appointment was renewed for one year.

On 20 April 1967, a Personnel Action form was issued (and copied to the Applicant) specifying that the Applicant - who in the meantime had been reassigned to the United Nations Force in Cyprus (UNFICYP) and had received

a further extension of his appointment - had become a full participant in the Pension Fund as of 11 March 1966, in accordance with article II, paragraph 1 c) ii) of the Pension Fund Regulations, which provided that

> "1. Every full-time member of the staff of each member organization shall become a participant in the United Nations Joint Staff Pension Fund if
>
> ...
>
> (c) Having been initially appointed for less than five years, he subsequently receives:
>
> ...
>
> (ii) An appointment which will extend his period of employment to or beyond five years; ..."

On 25 May 1967, the Applicant signed the Participant's Declaration form, which was received by the Pension Fund on 28 August 1967. The form contained the following notice:

> "If you wish to validate previous service in accordance with Article III, XII or XVI of the Regulations and consider that the eligibility requirements expressed in that article are met, you may obtain the necessary application forms from the Secretary of the Staff Pension Committee. Such application must be made within the time-limits provided by the Regulations."

On 12 June 1967, the Chief of the Payroll Section informed the Applicant that as a result of his full participation in the Pension Fund, effective 11 March 1966, the Payroll Section would deduct from his end-of-the-month pay cheques from June 1967 until March 1968, a total amount of $452.94.

The Applicant was successively reassigned to UNTSO, to the United Nations Relief Operation in Bangladesh (UNROB), to UNTSO again, to the United Nations Military Observer Group in India-Pakistan (UNMOGIP) and, on 21 June 1980, to UNFICYP.

On 12 November 1981, in a memorandum addressed to the Director of the Field Operations Division at Headquarters, the Chairman of the UNTSO Unit of the Field Service Staff Union drew attention to the situation of 15 Field

READEX
FICHE

Service staff members, including the Applicant, whose initial period of service was not covered for pension purposes; he stated inter alia:

> "When these staff members eventually were admitted into the Pension Fund, they were not informed that they could re-validate their period of service for pension purposes within a one-year limit. Many of them were serving away from UNTSO or other headquarters of the UN offices and were assigned to very small stations in remote areas such as Rabah or some other OPs [Observation Posts] where no one could either advise them of the above limitation for such purposes, nor, in most cases, were they given a copy of the Pension Fund regulations. They were therefore unable to apply within the prescribed time-limit. Later on when they became aware of the possibility of revalidation of their prior service and the benefits they would derive from it, they all made individual applications to the Pension Fund but were turned down because of the expiration of the time-limit for such restoration."

On 18 February 1983, the Controller of the United Nations agreed to a proposal by the Assistant Secretary-General for Personnel Services, that a working group be established to examine the question of validation of the non-contributory service of the 15 Field Service Officers in the Pension Fund. The Working Group, composed of representatives of the Office of Personnel Services, the Office of Financial Services and the Office for Field Operational and External Support Activities, submitted its report to the Assistant Secretary-General for Personnel Services and the Assistant Secretary-General for Financial Services on 13 May 1983. In its report, the Working Group noted that the legal situation in those cases was quite clear since the staff members concerned had failed to comply with the specific terms of the Pension Fund Regulations (previous article III and present article 23) under which no request for validation of non-contributory service could be entertained unless it was made within the time-limit, by notice in writing to the Secretary of the Staff Pension Committee. After examining arguments advanced on behalf of the Field Service Officers concerned, suggesting that the time-limit should be waived in their case, the Working Group noted that a review of their individual circumstances, including their own accounts, had failed to produce any evidence that might justify the retroactive validation of their prior non-contributory service on compassionate grounds. As to the Applicant, the Working Group stated:

"13. In reviewing the individual cases, the working group took particular note of the case of Mr. D. McReynolds, currently serving with UNFICYP as an Administrative Assistant (Personnel/Travel Officer) at the FS-5 level. Mr. McReynolds had been an Associate participant of the Pension Fund since 1 August 1961, when he was assigned to ONUC. By 11 March 1966, when his fixed-term appointment was extended for one year to bring the total period of his employment beyond five years, he became entitled to full participation as from that date under Article II of the Pension Fund Regulations then in effect. However, the Personnel Action authorizing the full participation was not issued until 20 April 1967, i.e. more than a year later. Mr. McReynolds subsequently completed the Participant's Declaration Form and payroll deductions were effected by installments to cover the costs of his participation with retroactive effect from 11 March 1966. According to Mr. McReynolds, in the same year, he attempted, through the Administration, to validate past service. 'I understand that my request had been forwarded to New York HQS but in fact it had been mislaid at UNFICYP (where I was posted in 1966). It must have been a year later that my request turned up and was returned to me and I was told that I should approach the UNJPF directly. Due to my own negligence I did not follow up as I felt I was already outside the grace period for revalidation'. (memorandum dated 28 January 1982).

14. In the view of the working group, two aspects of the case appear to deserve consideration. One was that since Mr. McReynolds' enrollment as a full participant on the basis of the P.5 action took place more than one year after the effective date of his participation, it would be technically impossible for him to apply for validation, if the time-limit of one year as from 'the commencement of full participation' were strictly adhered to. In practice, the working group understands that the Pension Fund Secretariat would have adopted a flexible attitude in such cases in admitting applications for validation submitted to it within one year following the actual enrollment. In the case of Mr. McReynolds, it is not disputed that he had in no time approached the Pension Fund Secretariat with either an inquiry about the possibility of validation or an actual application. He cannot therefore be said to have been deprived of the opportunity for validation as a result of the delay in his enrollment.

15. Another aspect was his assertion that he had attempted, through the Administration, to validate past service, but his request was apparently mislaid and as a result he did not follow up with the application. The working group noted that his statement did not provide any details regarding his

attempt to validate and in any case, he acknowledged that 'I am not able to provide any documentary evidence to prove my desire to revalidate my service back in 1960.' Even on the assumption that his statement was correct, the implication of negligence on the part of the Administration would not have absolved him of his own responsibility to pursue the matter with the Pension Fund Secretariat. Indeed, the situation would have become quite similar to the case of El Tawil. There, the Administrative Tribunal, having made a specific finding of administrative error in dealing with the Applicant's request for validation, was nevertheless of the opinion that the conduct of the officials of the Administration did not dispense with the requirements of the Regulations and Rules that notice in writing be given to the Secretary of the Pension Fund Committee. As noted above, the Tribunal concluded that the negligence of the Applicant in not following the required procedure was the determining factor in depriving him of the validation of his non-contributory service. Following this reasoning and taking into account all the circumstances, the working group does not feel that it can come to any different conclusion with regard to the case of Mr. McReynolds."

The conclusions and recommendations of the Working Group were as follows:

"18. The working group concludes that the requests submitted by the ... Field Service Officers are basically not much different from the situation of many other participants who, when given the opportunity to validate their prior non-contributory service, failed, for one reason or another, to do so within the time-limit prescribed in the Pension Fund Regulations. The working group found no special circumstances, in terms of either their general working conditions or their personal situation that would justify a retroactive waiver of the time-limit which the Pension Board is not empowered to grant under the Regulations and Administrative Rules of the Pension Fund. Even if the Organization were to give special consideration to their requests by agreeing to absorb the actuarial costs of validation, it would have to accord the same treatment to all those who had initially failed to validate on time but later changed their mind. The administrative and financial implications of such action will be prohibitive.

19. The working group therefore shares the view of the Pension Fund Secretariat that no possibility exists for offering the Field Service Officers concerned any special treatment which the Organization is not prepared to offer to numerous others in the same situation. Accordingly, it recommends that a firm decision be taken to reaffirm to the

staff members concerned that their requests for validation cannot be entertained because of their failure to comply with the requirements of the Pension Fund Regulations."

In a memorandum of 7 September 1983, addressed to the Assistant Secretary-General for Field Operational and External Support Activities, the Assistant Secretary-General for Personnel Services summarized the findings and conclusions of the Working Group and advised that the requests for validation of the Field Service Officers concerned could not be entertained because of their failure to comply with the requirements of the Pension Fund Regulations.

On 8 November 1983, the Applicant, who in the meantime had been reassigned to UNTSO, was informed of the decision of the Assistant Secretary-General for Personnel Services by an information circular from the Chief Administrative Officer of UNTSO addressed to all civilian staff. On 5 December 1983, the Applicant requested the Secretary-General to review that administrative decision. On 10 January 1984, having received no reply from the Secretary-General, he lodged an appeal with the Joint Appeals Board. The Board submitted its report to the Secretary-General on 2 May 1986. The Board's conclusions and recommendation read as follows:

"Conclusions and recommendation

41. The Panel finds that there were exceptional circumstances in the case of the appellant due to misguidance and a series of faults on the part of the Administration which prevented the staff member to exercise his right of validation of prior non-contributory service for pension purposes within the prescribed time-limit under Article III of the UNJSPF Regulations then in force. The Panel finds therefore that it would be unfair and inadmissible if the appellant were to have to suffer the adverse consequences of a situation of maladministration through no fault of his own, thus depriving him of his right of validation of prior service.

42. The Panel finds that there are compelling reasons both in fact and in law which exceptionally warrant a retroactive waiver of the time-limit for validation of the appellant's prior non-contributory service from 11 March 1964 to 11 March 1966 for pension purposes in fairness to the staff and in accordance with the principle of good faith in the relations between the staff and the Organization. Consequently, the

> Panel recommends that such a waiver be granted or alternatively, that the appellant be properly compensated by the Administration by payment of a lump sum.
>
> 43. The Panel makes no other recommendation in support of this appeal."

On 17 September 1986, the Secretary of the United Nations Joint Staff Pension Board sent a memorandum concerning the Applicant's case to the Office of Personnel Services.

On 19 January 1987, the Assistant Secretary-General for Personnel Services informed the Applicant that the Secretary-General, having re-examined the case in the light of the Board's report, had decided to maintain the contested decision and that the Secretary-General's decision was based on his conclusion that:

> "a) there is no evidence that you submitted, as you have alleged, an application for validation of your prior non-contributory service prior to 20 April 1968, and
>
> b) that, even assuming you had submitted such an application, you did not show sufficient diligence in following through with your request since you only raised the issue in 1981, fourteen years later. For your rights not to have been adversely affected by any initial error of the Administration, you would have had to have shown such diligence."

On 17 February 1987, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. It was technically impossible for the Applicant to apply for validation of his prior service within the one-year time-limit from the commencement of full participation in the Pension Fund.

2. In 1967, the Applicant could not know whether the Pension Fund might possibly grant him a waiver for retroactive validation. The Administration at UNFICYP and Headquarters failed to advise the Applicant that he was apparently allowed to submit a late application for validation.

3. Neither the Applicant nor the UNFICYP administration could know that validation was possible. The UNFICYP administration was convinced and convinced the Applicant in turn that he was outside the time-limit for validation.

Whereas the Respondent's principal contentions are:

1. The Applicant is mistaken in asserting that the late preparation of his P-5 form deprived him of an opportunity to validate his prior service.

2. The Applicant has not established that he applied to the Pension Fund for validation of previous service within one year of his eligibility therefor.

3. The one-year time-limit for validation under article III(1) of the former Pension Fund Regulations cannot be waived.

4. The Applicant's negligence and laches cannot be excused by any fault of the Administration.

The Tribunal, having deliberated from 30 May to 9 June 1989, now pronounces the following judgement:

I. In essence, the Applicant is requesting the Tribunal to grant him the right to validate, for pension purposes, the period of his prior non-contributory service from 11 March 1964.

II. In its report of 2 May 1986, the Joint Appeals Board found that there were "exceptional circumstances in the case of the appellant due to misguidance and a series of faults on the part of the Administration which prevented the staff member to exercise his right of validation of prior non-contributory service for pension purposes within the prescribed time-limit under article III of the UNJSPF Regulations then in force ... through no fault of his own...". The Board recommended to the Secretary-General that he should authorize the Applicant to validate his service from 11 March 1964 to 11 March 1966, or award him an appropriate amount as compensation.

III. On 19 January 1987, the Respondent rejected the Applicant's request on the grounds

(1) That it had not been established that he had submitted, prior to 20 April 1968, an application for validation of his previous non-contributory service; and

(2) That, even assuming that he had submitted such an application, he had failed to show sufficient diligence in following through on his request.

IV. The Applicant became a participant in the Pension Fund retroactively as of 11 March 1966, in accordance with a Personnel Action form issued on 20 April 1967 and transmitted to the Applicant by 25 May 1967, at the latest, when he was on assignment with the United Nations Peace-keeping Force in Cyprus (UNFICYP).

V. The Applicant was informed, at the time of the notification in 1967, concerning his participation in the Pension Fund, that he was debarred from validating his previous service, the prescribed period of one year for requesting validation of prior service having expired.

VI. The Tribunal, accordingly, takes note that a serious error was made and perpetuated at all administrative levels beginning from the time when the Applicant was notified of his participation. The error persisted at least until the memorandum of 17 September 1986, from the Secretary of the United Nations Joint Staff Pension Board.

VII. The same error appears in the report of 12 May 1983, of the Working Group established to examine the question of validation of the non-contributory service of 15 Field Service Officers, including the Applicant. As far as Mr. McReynolds is concerned, the report indicates: "Since Mr. McReynolds' enrollment as a full participant ... took place more than one year after the effective date of his participation, it would be technically impossible for him to apply for validation, if the time-limit of one year as from 'the commencement of full participation' were strictly adhered to."

VIII. In other words, it was the Administration's firmly held view, transmitted and confirmed to the Applicant, that the one-year period had expired even prior to the date on which notification of the Applicant's participation in the Pension Fund was given.

IX. In his memorandum of 17 September 1986, the Secretary of the Joint Staff Pension Board indicated, without making any comment, that the application for validation, which had to be submitted "within the prescribed

time-limit", should have been submitted no later than 20 April 1968. In the Secretary's view, the one-year time-limit started to run from the date on which the Personnel Action form indicating participation in the Pension Fund was actually issued, and certainly not from the date, 11 March 1966, when participation was retroactively made to commence.

X. The Tribunal considers that the persistent error on the part of the Administration as to the date on which the time-limit for validation period began to run implies the Respondent's liability to the Applicant.

XI. The Tribunal notes that in the particularly difficult conditions prevailing at the time, particularly at remote stations in the field, normal administrative procedures (acknowledgements of receipt, filing and transmission of documents) were not always followed.

XII. The Tribunal is faced with two conflicting assertions, one made by the Applicant and the other by the Respondent. The Applicant claims that in 1967, he submitted an application for validation of prior service, while the Respondent maintains that it has not been established that the Applicant did so.

XIII. On the point of law, while recognizing that it is not necessary to reach a decision on the exact date on which the one-year time-limit should have started, the Tribunal endorses the following view expressed by the Secretary of the Joint Staff Pension Board in his memorandum of 17 September 1986:

> "If it is proven that Mr. McReynolds did in fact submit such an application to the UN within the prescribed time-limit [that is to say, no later than by 20 April 1968], but that due to the negligence of UNFICYP administration his application was not forwarded to the Pension Fund, this error would then have to be corrected and he should be allowed now to make pensionable all his prior non-contributory UN service, i.e. including the 1960/1964 period."

XIV. However, if the Tribunal concludes that the Applicant in fact did not submit an application for validation, it must still decide whether, notwithstanding the Applicant's failure to do so, the Administration remains liable as indicated above (para. X).

XV. The Applicant asserts that he made an oral request for validation of his prior service to the personnel officer, a radio operator, at his place of assignment at the time when the personnel officer informed him that he had become a participant in the Pension Fund and had him sign the participant's declaration form in 1967. However, the file does not contain any record of this oral request to the personnel officer, who has retired in the meantime. The Respondent did not see fit to approach the former staff member in question for information. Although the Applicant did write to him requesting a statement, he has received no reply.

XVI. In a memorandum dated 28 January 1982, submitted to the Working Group, the Applicant asserted that he had filed a written request for validation in 1967. He explained that he understood that his request had been forwarded to Headquarters in New York; it had in fact been mislaid at UNFICYP, and it came to light one year later. According to the Applicant, his application was then returned to him and he was advised to approach the Pension Fund directly. He acknowledges that he did not pursue the matter, since the Administration considered it time-barred.

XVII. The Applicant reiterated this assertion to the Joint Appeals Board. The Board seems to have recognized it as well founded, without however indicating what justification there was for its conclusion.

XVIII. In response to a question asked by the Tribunal, the Applicant confirmed that he had in fact made two requests for validation, one oral and the other in writing, and that he had not taken the matter any further in view of the Administration's categorical statement that his request for validation was time-barred.

XIX. However, the Applicant has not provided any specific information regarding his written request.

XX. The Tribunal believes that although there is some presumptive evidence that the Applicant did in fact request validation in 1967 it is insufficient to prove that he did so.

XXI. It therefore remains for the Tribunal to consider whether the Applicant's silence and inaction from 1967 to 1981 constitute negligence of a kind sufficient to eliminate or mitigate the Administration's liability noted above (para. X).

XXII. The Tribunal must reiterate that the error made by the Administration, which was perpetuated until 1986, was particularly serious. It is understandable that the Applicant, who had received a forceful response from the Administration to the effect that the one-year period for filing an application had come to an end on 11 March 1967, was completely discouraged and decided to take no further action.

XXIII. On the other hand, the Tribunal must attribute a certain amount of negligence to the Applicant. In the period from 1967 to 1981, he never addressed a direct inquiry about his rights to the Pension Fund, despite the advice given to him, which he acknowledges, that he do so. The Tribunal therefore believes that he bears some responsibility.

XXIV. However, in view of the decision that the Tribunal will reach, it is not necessary to pronounce itself on the implications of the responsibilities of either the Applicant or the Respondent.

XXV. On the basis of the response to a question that it had posed, the Tribunal established that the Administration should have declared the Applicant a participant in the Pension Fund as from 11 March 1965 and not as from 11 March 1966. The Tribunal believes that this error, which is even more serious than the error referred to in paragraph VI, must be rectified by the Respondent without delay.

XXVI. On these grounds, the Tribunal:

1. Orders the Respondent to take the necessary steps to ensure that the Applicant is considered as having been a participant in the United Nations Joint Staff Pension Fund since 11 March 1965;

2. Orders the Respondent to make the necessary payments for that purpose to the Pension Fund, it being understood that the Applicant will pay to the Pension Fund any contributions that he may owe in respect of the same period, including any statutory interest due;

3. Rules, consequently, that the one-year period for validation provided for in article III of the Pension Fund's Regulations in force at the relevant time shall begin on the date on which the Applicant is notified by the Administration that he was a participant in the Pension Fund as from 11 March 1965.

XXVII. The Tribunal rejects all the Applicant's other pleas.

(Signatures)

Roger PINTO
Vice-President, presiding

Samar SEN
Member

Francisco A. FORTEZA
Member

Geneva, 9 June 1989

Jean HARDY
Acting Executive Secretary